REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 139 OF 2015

[Formerly Eldoret Hccc No. 195 of 2009]

CHEMALAL (TWO) FARM COMPANY LIMITED.....PLAINTIFF

VERSUS

PHYLLIS CHEPKOECH KEINO.....DEFENDANT

RULING

Chemalal (Two) Farm Company Limited sued **Phyllis Chepkoech Keino** claiming that it is a body corporate duly established as such under the Companies' Act, Cap. 486, Laws of Kenya. The defendant is a female adult and a director of the plaintiff and once acted as the Company Secretary of the plaintiff and at one time as the Treasurer of the Company. The plaintiff claims to be the sole owner of the land parcels known as 5376/2, 5376/4 5377/4 and 11039/3 located at Kamagut which in total measures approximately 1051.96 hectares (2,600 Acres) and has been processing its title deeds for its shareholders.

The plaintiff avers that in the course of the processing of the titles for its members it emerged that the defendant had surreptitiously, fraudulently and in flagrant abuse of her office as the Company Secretary of the plaintiff and in total breach of her fiduciary duties proceeded to process fraudulent deed plan No. 240855 that has had the effect of merging the plaintiff's land with land parcel L.R. No. 5376/3 which belongs to LESERU FARM The plaintiff avers that the defendant has further applied for and obtained consent to transfer the entire plaintiff's land to an entity which is described as CHEMALAL FARMERS.

The plaintiff further avers that the defendant has acted surreptitiously, fraudulently and illegally. The particulars of fraud are listed as follows:

a) **Using her office to divert the plaintiff's property.**

b) **Breaching her fiduciary duties as an officer of the plaintiff by applying for consent to transfer the plaintiff's land to CHEMALAL FARMERS.**

c) **Acting without the authority of the shareholders and the Board of Directors of the plaintiff to merge the plaintiff's land with that of LESERU FARM.**

d) **Using her position as an officer of the plaintiff to perpetrate fraud fraudulent acquisition of property.**

e)**Altering the original shareholders register.**

f) **Altering the sub-divisional consent issued to the plaintiff by the Land Control Board.**

The plaintiff therefore prays for a declaration that the acts of the defendant in applying for consent of the Land Control Board dated 12.9.2002 to transfer the plaintiff's land parcels, the preparation of the deed plan No. 240855 in respect of' the land parcel L.R. No. 5376/5 and the fraudulent dealings with the plaintiff's land parcels is unlawful and the consent letter together with the deed plan and any dealings perpetrated by the defendant as a result of' the fraudulent documentation are a nullity and of no juridical effect . The plaintiff also seeks a perpetual injunction against the defendant restraining her by herself, her servants and/or agents, howsoever named whether as Chemalal Farmers from selling, transferring and dealing in the parcels known as L.R. Nos. 5376/2, 5376/4, 5377/4 and 11039/3 located at Kamagut or any other parcels of land and conversions that originated from the said original parcels.

The defendant filed a statement of defence stating that the Plaintiff is as conceded, a limited liability company duly incorporated under the Provisions of the Companies Act (Cap 486) of the Laws of Kenya. The Plaintiff is therefore capable of suing and being sued in its own name and the Plaintiff can only sue and or instruct an advocate to act on its behalf on the basis of a Director's/Members resolution. No such

resolution was passed authorizing this suit to be filed or appointing any firm of advocates to file the suit and the suit now before court was filed without the Plaintiff's permission and or authority. Therefore, the suit is bad in law, incompetent and is an abuse of the court process. In view of all he foregoing, the Defendant therefore files the defence under protest.

The defendant denies that the purported plaintiff is the owner of L.R. No. 5376/2, 5376/4, 5377/4 and or 11039/3 located in Kamagut. She alleges that the suit properties are owned by Chemalal Farm Limited being registration Number 7/77. The defendant denies that the plaintiff is the owner of the property and further denies allegation of fraud. She states that the consent of the Land Control Board was sought and obtained by Chemalal Farm Limited, the owner of the property. The defendant seeks to raise a preliminary objection in the grounds that:

(a) **The suit was instituted without a resolution either authorizing the filing of the suit or appointing the firm of M/S Wambua Kigamwa & Company Advocates to act for the purported Plaintiff in the matter.**

(b) **The purported Plaintiff does not own any of the suit parcels of land and has no locus standi to institute the suit.**

(c) **The suit was wrongly instituted in the name of the purported Plaintiff Company.**

(d) **The verifying affidavit is incompetent.**

(e) **Joel Kisorio Sang is a separate and distinct legal entity from the Plaintiff and cannot purport to file suit on behalf of the purported Plaintiff without its consent and/or authority.**

On 2.4.2012, J. N. Njuguna & Company Advocates filed a preliminary objection on behalf of the company stating that:

1. The said company does not own and has no proprietary interests over the suit land herein.

2. At no time did the company make a resolution to institute the suit or authorize the purported deponent of the verifying to do so on its behalf.

3. At no time did the company make a resolution instructing the firm of M/s Kigamwa Wambua & Company Advocates to act for and or represent it in any suit, action and or dispute.

4. Therefore, the entire suit is incompetent fatally defective and an abuse of the process of the law.

When the matter came for hearing, ***M/s Koech learned counsel for the company*** submitted that Notice of Appointment of Advocates was filed by the firm of J. N. Njuguna on 15.12.2009 attaching the resolutions passed by the company. The gravamen of the preliminary objection is that the suit filed by the firm of Wambua Kigamwa for the plaintiff lacked the mandatory component of a resolution of the company. At no point did the Directors authorize the deponent to verify the affidavits. The verifying affidavit filed on 3.12.2009 indicates that John Kisorio had authority to swear the affidavit but he did not attach any resolution to that effect. M/S Koech argues that the suit in court is a non-starter as there is no resolution backing the institution of the case and therefore the same is incompetent and defective. The suit was instituted without a resolution. The firm of J. N. Njuguna were instructed to file a notice of appointment of advocate on 15.12.2009. Pursuant resolution of a meeting held on 11.12.2009. She states that resolution was signed by 2 directors but she does not have the Minutes of the Meeting where the resolution was made. Lastly, on the issue of costs, she argues that the costs should be borne by the Advocate purporting to act.

M/s Kuyaki learned counsel for the defendant submits that for court proceedings to be instituted, there must be authority to do so. There has to be a resolution by the shareholders. It is unlawful for the directors to file a suit in the company's name with resolutions. The same have not been exhibited. He prays for costs to be borne by the plaintiffs' advocate.

Mr. Kigamwa learned counsel for the plaintiff submits that the issues raised by the firm of J. N. Njuguna and defendants' advocate are purely factual issues that require evidence. The validity of resolution authorizing the firm of Njuguna to act for the company is under challenge as no Minutes authorizing the firm of Njuguna have been shown to court. The resolution was not necessary due to the fact that the defendant is described as the company secretary of the plaintiff. It was impossible to call for a meeting to resolve to sue the company secretary. In this form of action, a resolution would not be necessary as it cannot be obtained.

The question this court should resolve first is whether the firm of J. N. Njuguna is properly on record to raise the preliminary objection and who does he represent. I do find that though there is a document referred to as resolutions of the Board of Directors and Shareholders' meeting held by Chemalal (Two) Farm Company Limited on 11.12.2009 at Lewa Children's Home at 10.00 a.m. There are no Minutes of the said meeting. Whether there was a meeting or not in which the resolution was passed is a factual issue that cannot be determined by a preliminary objection. The firm of J. N. Njuguna has not demonstrated that the person instructing them complied with the provision of law in appointing the law firm to act on behalf of the company. It was necessary for the firm of J. N. Njuguna to avail the proceedings of the meeting held on 11.12.2009 at Lewa Children's Home. Moreover, the resolution does not disclose the names of the directors who approved the appointment of the firm of J. N. Njuguna to act for the company and withdraw the suit. In a nutshell, this court finds that the material placed before it by way of a preliminary objection are not sufficient to warrant the withdrawal of the suit through a preliminary objection.

In the *locus classicus* case of ***Bugerere Coffee Growers Limited Vs Sebaduka & Another [1970] E.A. 147***, it was evident that a meeting of members of the plaintiff company was requisitioned under the provision of the Companies Act by Shareholders. The Directors failed to call for a meeting the requisitions called for one themselves and a resolution was passed of which resolution, the notice calling the meeting, had given particulars. In this matter, no evidence has been adduced to show that there was a requisition for a meeting and that the same was held as provided for by law. The resolution produced by the firm of J. N. Njuguna is inadequate as it is not supported by the proceedings. There is

no evidence of the requisition, the Notice of the meeting and particulars of the intended resolutions and the Minutes of the Meeting where the resolution was given to appoint the firm of J. N. Njuguna to strike out the suit or withdraw the same. M/s Njuguna and company advocates ought to have filed an application to strike out the suit.

The defendant was represented by M/s Kuyaki who raised a preliminary objection in its defence that the suit was instituted without a resolution either authorizing the filing of the suit or appointing the firm of M/s Wambua Kigamwa & Company Advocates to act for the purported Plaintiff in the matter. When the preliminary objection was raised in court by M/s Kuyaki, I interrogated Mr. Kigamwa to find out whether there was a resolution that he be appointed to act for the plaintiff and to commence the suit herein. Mr. Kigamwa did not show me any such a resolution, proceedings or notice of the meeting where the resolution was made. The logical conclusion is that this suit was filed without the resolution of the company contrary to the provisions of the Company's Act.

I have considered the preliminary objection raised by M/S Kuyaki and the pleadings herein and do find that there is no resolution by the company to engage the firm of Kigamwa & Company Advocates and to file the suit herein. Moreover, there are no Minutes of the resolutions if any authorizing the firm of Kigamwa to commence the suit on behalf of the company. Mr. Kigamwa argues that the matters raised by the firm of Mr. Njuguna are factual issues that require evidence. Mr. Kigamwa further argues that the resolution provided by Mr. Njuguna is also not supported by Minutes.

It is trite company law that a limited liability company is a legal person which acquires its own property, rights and liabilities separate from its members upon incorporation. The old locus classicus case of **Salomon vs. Salomon Company Limited [1895-99] All ER 33** laid that principle to rest. The gist of this case that the proper plaintiff in any proceedings or action in respect of a wrong done to the company, is the company itself. The principle was restated in **Foss vs. Harbottle (1843) 67 ER 189** (**the Foss case),** popularly referred to in company law as "*the rule in Foss v. Harbottle" (the rule)*. The rule was restated by Jenkins L. J. in the case of

Edwards vs. Halliwell (1950) All ER 1064 as follows: -

> ***"The rule in Foss-v-Harbottle, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue."***

However, this rule is not inflexible as it can be applied with exceptions to meet the ends of justice. Lord Denning M. R in ***Moir* vs.Wallerstainer [1975] 1 All ER 849 at pg 857,** thus:-

> ***"It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in Foss V. Harbottle (1843) 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue."***

Lord Denning in the **Moir case (supra)** posed the appropriate question: -

> ***".....But suppose (the company) is defrauded by insiders who control its affairs – by directors who hold a majority of the shares – who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorize the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue themselves. Yet, the company is the one person who is indemnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress....."***

I do find that the shareholders of the plaintiff have the right to file a derivative suit where the company had a cause of action and where a legal right has been violated and where it is not possible to sue in its own name to redress the wrong or breach and more so, where the alleged wrong doers themselves are the directors or majority shareholders in the company. In this matter, the defendant is the company secretary and it is being alleged that she is using her office to divert the plaintiff's property and that she is acting without the authority of the shareholders and Board of Directors. It would be impossible for the company to file the suit without the support of the company secretary and the directors. The suit herein has been filed by the company without a resolution. There are three directors of the company:

1. ***Basiliano Kirwa Samoei***

2. ***Joel Kisorio Samoei***

3. ***Phyllis Chepkoech Keino***

The three directors including the company secretary appear to be pulling in opposite sides and therefore, affecting the operation of the

company wherein the property is in danger of being wasted or misappropriated. The House of Lords in **Prudential Assurance Company Limited v Newman Industries Limited and Others [1982] 1 ALL ER 364 at page 357** held thus: -

> "(*a*)***There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority shareholders cannot confirm the transaction;***
>
> ***(b) There is also no room for the operation of the rule if the transaction complained of could be validly sanctioned only by special resolution or the like because a simple majority cannot confront a transaction which requires the concurrence of a greater majority; and***
>
> ***(c) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company."(emphasis mine)***

It is my view that though the suit is not a derivative action, the same can be saved by an amendment. Ultimately, the plaintiff is granted 14 days to amend the plaint. The preliminary objection is dismissed with costs.

Dated and delivered at Eldoret this 19th day of March, 2018.

A. OMBWAYO

JUDGE